



In the Matter of:

**U.S. DEPARTMENT OF ENERGY,
RICHLAND, WASHINGTON OFFICE'S
DAVIS-BACON DETERMINATION FOR
PROJECT NO. W-211,**

ARB CASE NO: 03-016

DATE: March 31, 2004

**Petition by Hanford Atomic Metal Trades
Council Seeking Review of the August 27, 2002
Ruling Letter as applied to the Project No. W-211.**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioner The Hanford Atomic Metal Trades Council:

**Daniel M. Katz, Esq., Louise P. Zanar, Esq., Aaron Larks-Stanford, Esq., Katz
& Ranzman, P.C., Washington, D.C.**

For Respondent Administrator, Wage and Hour Division:

**Leif G. Jorgenson, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq., U.S.
Department of Labor, Washington, D.C.**

*For Intervening Interested Party The Building and Construction Trades Department,
AFL-CIO:*

**Terry R. Yellig, Esq., Sherman, Dunn, Cohen, Leifer & Yellig, P.C., Washington,
D.C.**

FINAL DECISION AND ORDER

This case arises under the Davis-Bacon Act, as amended (DBA), 40 U.S.C.A. §§ 3141-3148 (West Supp. 2003), and regulations at 29 C.F.R. Parts 1, 5, and 7 (2003). Also at issue is the McNamara-O'Hara Service Contract Act, as amended (SCA), 41 U.S.C.A. §§ 351-358 (West 1987); 29 C.F.R. Parts 4 and 8 (2003).

The Hanford Atomic Metals Trades Council (HAMTC) petitions for review of a ruling by the Administrator, Employment Standards Administration, Wage and Hour Division, that DBA standards, rather than SCA standards, apply to certain "items of work" on Project W-211 at the Department of Energy (DOE) Hanford Site, Richland, Washington. HAMTC represents service employees who traditionally have performed

the types of activities involved in these items of work. The Building and Construction Trades Department, AFL-CIO (Building Trades Department) opposes HAMTC's petition. It represents construction employees who now perform or will perform these items of work because DBA standards apply as the result of the Administrator's ruling. Under the applicable wage determinations, service employees are more highly paid than construction employees.

In ruling that DBA standards applied, the Administrator reconsidered her earlier ruling that SCA standards applied. She argues here that she had authority to reconsider that ruling and to reverse and rescind it. We conclude, however, that the Administrator abused her discretion when she reconsidered her earlier ruling. We accordingly grant HAMTC's petition.

Jurisdiction and Standard of Review

We have jurisdiction to decide appeals from the Administrator's final decisions concerning DBA wage determinations. 29 C.F.R. § 7.1(b). *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). Our review of the Administrator's decision is in the nature of an appellate proceeding. 29 C.F.R. § 7.1(e). We review the Administrator's decision to determine whether it is consistent with the statutes and regulations and is a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the DBA. *Millwright Local 1755*, ARB No. 98-015, slip op. at 7 (ARB May 11, 2000) (DBA conformance proceeding); *Miami Elevator Co. and Mid-American Elevator Co., Inc.*, ARB Nos. 98-086, 97-145, slip op. at 16 (ARB Apr. 25, 2000) (same); *Dep't of the Army*, ARB Nos. 98-120/121/122, slip op. at 16 (ARB Dec. 22, 1999) (SCA), *citing ITT Fed. Services Corp. (II)*, ARB No. 95-042A (ARB July 25, 1996), and *Service Employees International Union (I)*, BSCA No. 92-01 (BSCA Aug. 28, 1992).

Statutory and Regulatory Provisions

The DBA applies to every contract of the United States for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works in the United States. 40 U.S.C.A. § 3142(a). The SCA applies to every contract entered into by the United States, the principal purpose of which is to furnish services in the United States through the use of service employees. 41 U.S.C.A. § 351(a).

The DBA requires that the advertised specifications for construction contracts to which the United States is a party contain a provision stating the minimum wages to be paid to the various classifications of mechanics or laborers to be employed under the contract. The Administrator issues minimum wage determinations. 29 C.F.R. § 1.1(a). The minimum wage rates contained in the determinations derive from rates prevailing in the geographic locality where the work is to be performed or from rates applicable under collective bargaining agreements. 29 C.F.R. § 1.3. "Prevailing" wages are wages paid to the majority of the laborers or mechanics in classifications on similar projects in the area. 29 C.F.R. § 1.2(a)(1). "All questions relating to the application and interpretation of

wage determinations (including the classifications therein) . . . shall be referred to the Administrator for appropriate [authoritative] ruling or interpretation.” 29 C.F.R. § 5.13. The SCA imposes a comparable scheme. 41 U.S.C.A. § 351(a); 29 C.F.R. §§ 4.3(a), 4.50, 4.54, 4.56. Under certain circumstances, DBA (construction) and SCA (non-construction) components of contracts must be segregated. 29 C.F.R. § 4.116(c)(2); 48 C.F.R. § 970.2204-1-1(a) and (b) (2003) (applicable DOE regulation).

Background

Project W-211 is designed to provide systems for storage, treatment, and retrieval of radioactive waste in giant double-shell tanks located on “tank farms” at the Hanford Site, formerly a nuclear weapons plant. Project W-211 is performed under a prime contract subject to the SCA, but also involves construction activity subject to the DBA.

HAMTC represents service employees who maintain and operate the Hanford Site. They traditionally performed work that necessitated intrusions into the storage tanks and were specially trained and experienced in handling radioactive waste. The six disputed items of work involve installing pumping, mixing, and monitoring equipment in the tanks to prepare for transferring the radioactive contents to a waste treatment plant for processing into glass, i.e., “vitrification.”¹ Some of the work, namely removing and disposing of contaminated equipment and components, can be analogized to demolition work prior to new construction. Other installation work involves extensive modification and overhaul to transform the function of the tanks similar to the design aspect of a construction project. Applying a DBA wage determination to these items of work effectively awards this work to lower-paid construction employees. *See generally* Administrative Record (AR) Tab MM, Exhibit (Exh.) 1.

DOE first determined that the entire Project W-211, which included 12 items of work, was construction work and that the DBA would apply. HAMTC appealed within DOE. DOE ultimately denied the appeal by letter dated October 3, 1997. AR Tab MM, Exh. 2. HAMTC then petitioned the Wage and Hour Division to review DOE’s determination that the DBA applied. AR Tab MM.

Ethel P. Miller of the Wage and Hour Division Office of Enforcement Policy, Government Contracts Team responded to HAMTC’s request and essentially affirmed DOE (“the Miller ruling”), holding that Project W-211 principally was a construction project subject to the DBA. AR Tab LL (June 26, 1998). HAMTC appealed to the Administrative Review Board (ARB). AR Tab KK. The Acting Administrator of the Wage and Hour Division moved to dismiss the appeal, arguing that Miller’s ruling was

¹ HAMTC contends that the following items of work are service activities subject to the SCA: (i) removing and disposing of contaminated equipment and components, (ii) installing mixer pumps in the tanks, (iii) installing transfer pump systems in the tanks, (iv) installing temperature probes and attendant cabling in the tanks, (v) installing television cameras, mast assemblies, purge systems, cables, and hoses in the tanks, and (vi) hooking up “jumpers” in the tanks for moving liquid.

not final. Although it found the ruling to be final and appealable, the ARB dismissed the appeal and remanded the case after the Wage and Hour Division expressed a willingness to reconsider the decision. AR Tab HH.

But on remand Acting Administrator John R. Fraser ruled against HAMTC (“the Fraser ruling”). While he agreed that portions of the work at issue were not subject to the DBA, he viewed the “matter solely within the jurisdiction of DOE [and] not within the scope of [Wage and Hour’s] jurisdiction.” AR Tab II (October 23, 1998). HAMTC immediately filed with the ARB a motion for summary reversal of the Fraser ruling. Thereafter, HAMTC’s counsel met with representatives of the Wage and Hour Division, including Miller. The agency representatives stated that they had become aware that Project W-211 was being performed under a prime contract subject to the SCA. They stated further that if HAMTC would agree to withdraw the motion for summary reversal and underlying appeal, they would issue a ruling that DOE must segregate DBA and SCA work on Project W-211 as HAMTC had requested. AR Tab GG. HAMTC’s counsel subsequently filed a notice withdrawing the motion for summary reversal and appeal. ARB Reply Brief of Petitioner HAMTC dated Feb. 10, 2003, Exh. A (Katz Declaration); AR Tabs AA, BB, CC, EE.

As a result, by letter dated April 16, 1999, the Division’s Timothy J. Helm issued a ruling (“the Helm ruling”) directing DOE to apply SCA standards to six of the 12 items of work. Helm stated in particular:

Of the in-farm work activities, at least items 1-6 would be service activities subject to SCA. Accordingly, please see that all necessary steps are taken in accordance with 29 C.F.R. 4.5(c) to retroactively include in Project No. W-211 the applicable SCA wage determination so that the affected employees may receive the benefits to which they are entitled under law. Please inform us of your actions in this matter as soon as possible.

AR Tab Y. Like Miller, Helm worked for the Office of Enforcement Policy, Government Contracts Team.

DOE declined to implement the Helm ruling. In December 1999, HAMTC filed suit in the U.S. District Court for the District of Columbia to compel DOE to segregate the service components from the construction components of Project W-211 as required by the Helm ruling.

Meanwhile, by letter dated October 13, 2000, the Building Trades Department requested that the Administrator reconsider the Helm ruling. AR Tab R. The Building Trades Department filed this reconsideration request 18 months after the Helm ruling.

In June 2001 the court granted DOE’s motion to dismiss the case, holding that DOE’s inaction was not sufficiently final to merit court review. It also held that the

Helm ruling was final agency action, but that given DOE's belief that it was not, DOE's inaction had not yet risen to the level of unreasonableness necessary to justify judicial intervention. See *Hanford Atomic Metal Trades Council, Inc. v. United States Dep't of Energy*, No. 99-3402 (D.D.C. Jun. 20, 2001); AR Tab R.

Then, in response to the Building Trades Department's request that she reconsider the Helm ruling, Wage and Hour Division Administrator Tammy D. McCutchen, on August 27, 2002, determined that the six items of work described as "service activities" in the Helm ruling constituted components of construction work subject to the DBA and were exempt from SCA coverage ("the McCutchen ruling"). AR Tab A. The Administrator issued this ruling three years and four months after the Helm ruling. The result is that all 12 items of work under Project W-211 now constitute construction work.

Issue

Did the Administrator abuse her discretion when she issued the August 27, 2002 ruling that rescinded the April 16, 1999 "Helm" ruling?

Discussion

Absent a specific statutory limitation, an agency has authority to reconsider an earlier decision. This authority is not unlimited, however. As stated by the court in *Macktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002), *aff'g Macktal v. Brown and Root, Inc.*, ARB Nos. 98-112/122A, ALJ No. 86-ERA-23, slip op. at 2-6 (ARB Nov. 20, 1998), under the Administrative Procedure Act, particularly 5 U.S.C.A. § 706(2)(A) (West 1996), "[a]n agency may not reconsider its own decision if to do so would be arbitrary, capricious, or an abuse of discretion. Reconsideration must also occur within a reasonable time after the first decision, and notice of the agency's intent to reconsider must be given to the parties."² Reconsidering an earlier decision involves "two opposing policies [which] immediately demand recognition: the desirability of finality, on the one hand, and the public interest in reaching [what], ultimately, appears to be the right result on the other." *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 321 (1961). And while further consideration may mandate revising an initial choice, "constant re-examination and endless vacillation may become ludicrous, self-defeating, and even oppressive. Whether for better or for worse so far as the merits of the chosen course are concerned, a point may be reached at which the die needs to be cast with some 'finality.'" *Id.* at 321 n.5 (quoting Tobias Weiss, *Administrative Reconsideration, Some Recent Developments in New York*, 28 N.Y.U.L.Rev. 1262 (1953)). In this vein, the federal judicial rules permit parties contracted periods in which to file for reconsideration. *E.g.* Fed. R. Civ. P. 59(e) (ten days to file motion to alter or amend judgment); Fed. R. App. P. 40(a)(1) (petition for panel rehearing filed within 14 days after entry of judgment). And

² In *Macktal*, the respondent filed its motion for reconsideration ten days after the ARB issued its decision, and the ARB notified the parties of its intent to reconsider three and one-half weeks thereafter. The court concluded that the ARB had not abused its discretion in reconsidering its decision.

adjudicators normally must conduct reconsideration within a short time frame measured in weeks rather than years. *Belville Mining Co. v. United States*, 999 F.2d 989, 1000 (6th Cir. 1993).

When the Building Trades Department requested the Administrator to reconsider the Helm ruling, it proceeded according to 29 C.F.R. § 5.13. Brief at 11-12. Section 5.13 contains no time limitation for its invocation. Captioned “Rulings and interpretations,” it provides:

All questions relating to the application and interpretation of wage determinations (including the classifications therein) issued pursuant to part 1 of this subtitle, of the rules contained in this part and in parts 1 and 3, and of the statutes listed in § 5.1 shall be referred to the Administrator for appropriate ruling or interpretation. The rulings and interpretations shall be authoritative and those under the Davis Bacon Act may be relied upon as provided for in section 10 of the Portal-to-Portal Act of 1947 (29 U.S.C. 259). Requests for such rulings and interpretations should be addressed to the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210.

29 C.F.R. § 5.13. We note that an analogous provision under the SCA contains a time limitation. Captioned “Review and reconsideration of wage determinations,” it provides:

In no event shall the Administrator review a wage determination or its applicability after the opening of bids in the case of a competitively advertised procurement, or, later that 10 days before commencement of a contract in the case of a negotiated procurement, exercise of a contract option or extension. This limitation is necessary in order to ensure competitive equality and an orderly procurement process.

29 C.F.R. § 4.56(a)(1). While a wage determination typically is issued and incorporated into a procurement contract prior to its award and the above-referenced time limitations apply, this Board and its predecessor have reviewed wage determinations incorporated post-award, necessitating another standard because the limitations period already has run. The issue in that circumstance is whether a party acted within a reasonable time in requesting review and reconsideration of the wage determination. Resolution of the issue depends on the particular circumstances of each case. *See Diversified Collection Services, Inc.*, ARB No. 98-062, slip op. at 2-5 (ARB Sept. 25, 1998) (two-month delay in filing request for review and reconsideration reasonable); *Jasper Co.*, BSCA No. 94-10, slip op. at 3 (BSCA Dec. 10, 1994) (two-month delay in filing unreasonable). *Cf. Thomas and Sons Bldg. Contractors, Inc.*, ARB No. 98-164, slip op. at 4-7 (ARB June 8, 2001) (five-

month delay in requesting reconsideration of ARB decision untimely). We see no reason not to apply this “reasonable time” standard to Section 5.13.

We hold, therefore, that under Section 5.13, an interested party must request the Administrator to review issues relating to DBA wage determinations within a reasonable time. What is more, we find that the regulatory scheme for appellate review of a final decision of the Administrator before the ARB, e.g., 29 C.F.R. § 8.7(b), serves as a useful guide for defining the outer limits of what constitutes a “reasonable time” under Section 5.13.

The Helm ruling (that the SCA applied to six items of work), like the Miller ruling (that the DBA applied exclusively), was a final order and, as such, was appealable to the ARB. *Hanford Atomic Metal Trades Council, Inc. v. United States Dep’t of Energy*, No. 99-3402, slip op. at 12 and n.4 (D.D.C. June 20, 2001); *Hanford Atomic Metal Trades Council*, ARB No. 98-138 (Sept. 23, 1998); *Diversified Collection Services, Inc.*, ARB No. 98-062 (ARB May 8, 1998). The applicable regulation requires that an appeal to the ARB be filed within 60 days of the Administrator’s ruling. 29 C.F.R. § 8.7(b). Should a party contemplating an appeal to the ARB decide instead to request that the Administrator reconsider the adverse ruling, he would therefore have to file that request within 60 days of said ruling. Thus, when the Wage and Hour Division issued the Helm ruling in April 1999, aggrieved parties and interested persons, such as DOE and the Building Trades Department, had two options: namely, to file an appeal with the ARB within 60 days of the ruling as provided under 29 C.F.R. § 8.7(b); or, as an intermediate step, to request that the Administrator reconsider the ruling prior to filing an appeal. The Building Trades Department, however, requested that the Administrator reconsider the Helm ruling 18 months, rather than 60 days, after it was issued. Therefore, BTDC’s request for reconsideration of the Helms ruling was not filed within a reasonable time.

Still, the 60-day limitations period within which to request reconsideration is not jurisdictional. It is subject to equitable modification, i.e., estoppel or tolling, when fairness requires. Estoppel may be appropriate if a party misleads another party regarding an operative fact forming the basis for a claim, the duration of a filing period, or the necessity for filing a claim. Tolling may be appropriate if a party, despite due diligence, is unable to secure information supporting the existence of a claim. *See Hill v. United States Dep’t of Labor*, 65 F.3d 1331, 1335 (6th Cir. 1995); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-453 (7th Cir. 1990).

The Building Trades Department has provided us with no reason for modifying the limitations period. The record establishes that the Trades Department knew about the administrative proceedings, the Helm ruling, and applicable time limitations for reconsideration and appeal.

On July 6, 1998, HAMTC appealed the Miller ruling to the ARB. Thereafter, on July 17, the ARB issued a Notice of Appeal and Order Establishing Briefing Schedule, with the HAMTC appeal and Miller ruling attached. The ARB served the notice and

attachments on Interested Persons, including Robert Georgine, President of the Building Trades Department, and Terry R. Yelig, Esq., counsel for the Trades Department. AR Tab KK. DOE filed its brief in support of the Miller ruling on September 17, 1998, with service on Georgine and Yelig. AR Tab JJ. The ARB's Order, issued on September 23, remanding the case to the Wage and Hour Division, also shows service on these Building Trades Department representatives. AR Tab HH.

Thereafter, the Acting Administrator's ruling (the Fraser ruling) was served on "all parties and intervening interested persons" on October 23, 1998. AR Tab HH. Further, HAMTC's motion for summary reversal of the Fraser ruling shows service specifically on Georgine and Yelig on October 26 when HAMTC filed the motion with the ARB. AR Tab GG. On October 29, the Building Trades Department filed a notice of intention to participate as an interested person in the ARB proceeding. AR Tab FF. The ARB Notice of Appeal and Order Establishing Briefing Schedule, issued on October 30, also shows service on these Building Trades Department representatives. AR Tab EE. On November 6, the ARB issued a Notice of Intervention advising of the status of the Trades Department as an intervening interested person requiring service of all pleadings or briefs. AR Tab DD. And again, HAMTC served the Trades Department with its Notice of Withdrawal of Motion for Summary Reversal and Appeal of the Fraser ruling on November 9, along with the attached letter to the Wage and Hour Division requesting review of the DOE coverage determination. AR Tabs BB, CC. And finally, the ARB dismissed the petition without prejudice on November 25, with service on the Building Trades Department. AR Tab AA.

Another fact undercuts the Building Trades Department's contention that its filing was timely. The Wage and Hour Division issued the Helm ruling on April 16, 1999, and in December 1999 HAMTC filed suit in federal district court to compel DOE to comply with the Helm ruling. AR Tabs Y, R. While not a party to that action, *Hanford Atomic Metal Trades Council, Inc. v. United States Dep't of Energy*, C.A. 99-3402 (D.D.C. Dec. 22, 1999), the Building Trades Department followed the case closely in its efforts to elicit reconsideration by the Wage and Hour Division of the Helm ruling. AR Tab R. Moreover, in May 2000, Local Unions representing construction workers contacted Helm directly to document their disagreement with his ruling. AR Tabs W, V, U.

In short, because of the Building Trades Department's knowledge of and participation in these proceedings, we discern no basis for modifying the 60-day limitations period.

Nor are we persuaded by the Administrator's argument that the August 27, 2002 McCutchen ruling occurred within a reasonable time of the April 19, 1999 Helm ruling. The Administrator states:

The Administrator's ruling inherently meets the "reasonable time" standard because its application is expressly limited to contracts not yet awarded. In this regard, neither Petitioner nor any other party has been

prejudiced. The public interest in reaching the correct decision is especially compelling in this case where only one of multiple contracts had been awarded for work which will be performed over a 20-year period.

Admin. Response to Petition For Review at 13 (emphasis in original). The record belies this argument, which is, essentially, “no harm, no foul.” DOE was required to implement a maintenance and construction schedule for Project W-211, but the Wage and Hour Division’s vacillating opinions as to which wage determination applied frustrated DOE in its attempted procurement. This caused DOE to hold off awarding subcontracts, and only when it became absolutely essential in order to implement the schedule did DOE begin procurement. *See, e.g.*, AR Tabs Q, P, M, L, B. Thus, not only did the Building Trades Department file an untimely request that the Administrator review the Helm ruling, but Wage and Hour’s changing positions significantly disrupted and delayed the procurement process.

Furthermore, by the Miller ruling, the Wage and Hour Division did not consider the requirement that in circumstances such as exist on Project W-211, construction and non-construction components of the project have to be separated in order to determine whether the DBA or SCA wage determination is applicable. *See* 29 C.F.R. § 4.116; 48 C.F.R. § 970.2204-1-1(a) and (b). HAMTC timely appealed the Miller ruling to the ARB which remanded the case to the Wage and Hour Division. The Fraser ruling followed, and it, essentially, avoided resolving the dispute. HAMTC immediately filed for reversal of the ruling, and six months later the Wage and Hour Division issued the Helm ruling that mandated segregation of construction and non-construction components under the contracts. Then, after an 18-month hiatus, the Building Trades Department petitioned the Administrator to reconsider the Helm ruling. The consequent McCutchen ruling came full circle, reaching the same result the Wage and Hour Division had reached in the Miller ruling more than four years earlier. These facts, particularly the belated McCutchen ruling, hardly promote competitive equality and an orderly procurement process. *See, e.g., Diversified Collection Services, Inc.*, ARB No. 98-062, slip op. at 2 (ARB Sept. 25, 1998); 29 C.F.R. § 4.56(a)(1).

Conclusion

We do not decide whether the Administrator correctly concluded that the DBA, rather than the SCA, applied to the six contested items of work. Rather, we conclude that the Administrator abused her discretion in entertaining the Building Trades Department’s request that she reconsider the Helm ruling because the Building Trades Department filed the request 18 months after the Helm ruling and has not persuaded us that equitable estoppel or tolling should apply. Furthermore, when the Administrator did issue a final

ruling in August 2002, she also abused her discretion since this ruling reconsidered and then rescinded a decision made more than three years earlier. Therefore, we **GRANT** HAMTC's petition for review and **VACATE** Administrator McCutchen's August 27, 2002 final ruling.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge